(17)

Supreme Court, U.S.
FILED
MAR 1 - 2005
OFFICE OF THE CLERK

No. 04-340

IN THE

Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T & R INVESTMENT CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF CONFERENCE OF CHIEF JUSTICES IN SUPPORT OF RESPONDENTS

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WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D. C. 20001

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BRIEF OF *AMICUS CURIAE* CONFERENCE OF CHIEF JUSTICES IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE* [1]

The Conference of Chief Justices ("the Conference") was founded in 1949 to provide an opportunity for the highest judicial officers of the states to meet and discuss matters of

[1] The parties have consented to the filing of this *amicus* brief. No counsel for any of the parties authored any part of this brief, and no person or entity other than the counsel and the *amicus* submitting this brief has made any monetary contribution to the preparation or submission of this brief.

importance in improving the administration of justice, rules and methods of procedure, and the organization and operation of state courts and judicial systems, and to make recommendations and bring about improvements on such matters. Membership in the Conference of Chief Justices consists of the highest judicial officer of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the territories of American Samoa, Guam and the Virgin Islands. The Conference of Chief Justices is governed by a Board of Directors and has several standing, temporary and special committees to assist the Conference in meeting its objectives.

The mission of the Conference of Chief Justices, as adopted on February 23, 1995, is to improve the administration of justice in the states, commonwealths and territories of the United States. The Conference accomplishes this mission by the effective mobilization of the collective resources of the highest judicial officers of the states, commonwealths and territories to:

- develop, exchange, and disseminate information and knowledge of value to state judicial systems;
- educate, train and develop leaders to become effective managers of state judicial systems;
- promote the vitality, independence and effectiveness of state judicial systems;
- develop and advance policies in support of common interests and shared values of state judicial systems; and
- support adequate funding and resources for the operations of the state courts.

On a highly selective basis, the Conference of Chief Justices has in the past filed briefs *amicus curiae* in the Supreme Court in cases with significant implications for the administration of justice or directly affecting the state court systems, including *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

SUMMARY OF ARGUMENT

The Conference respectfully suggests that the Court consider, for several different reasons, dismissing the petition for *certiorari* as improvidently granted. Over the course of this litigation, this case has narrowed down to claims that the San Francisco housing and zoning ordinances effect a taking because they fail to substantially advance a legitimate state interest. However, in *Lingle v. Chevron*, No. 04-163, the Court has granted review to decide whether a substantially advances claim states a claim under the Just Compensation Clause at all, as opposed to a claim under the Due Process Clause. Because the preclusion rules applicable to this type of putative takings claim might not apply to more traditional takings claims based on adverse economic impact, this is an inappropriate vehicle for addressing the question in the petition for *certiorari*.

In addition, the premise of the issue presented in the petition—that petitioners were "required" to litigate their takings claims in state court—is not correct in this case. One of petitioners' primary arguments is that it would be "unfair" to bar them from relitigating their takings claims in federal court based on a prior state court judgment rejecting their claims when they were "required" to litigate the claims in state court against their will. Since the factual predicate of the argument is not met in this case, this is not a suitable vehicle for addressing the questioned presented.

In any event, the Court should reject petitioners' argument on the merits because allowing duplicative litigation of takings claims in state and federal courts would produce a serious waste of judicial resources, undermine judicial comity, and be inconsistent with the policy favoring repose.

The Full Faith and Credit Act generally bars relitigation in federal court of legal disputes already adjudicated in state court, and petitioners have identified no applicable exception to this principle in this case. Neither the Court's decision in *Williamson County* nor its decision in *England* supports petitioners' position that takings claimants should have the opportunity to litigate the exact same lawsuit twice, once in state court and then again in federal court.

ARGUMENT

I. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR RESOLVING THE ISSUE RAISED BY THE PETITION FOR *CERTIORARI*

The petition for *certiorari* presents the following question: "Is a Fifth Amendment takings claim barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal takings claim?" For several different reasons, this case is an inappropriate vehicle for resolving this question. Accordingly, the Conference respectfully suggests the Court consider dismissing this petition on the ground that the writ of *certiorari* was improvidently granted.

1. First, this case represents an inappropriate vehicle because it is doubtful whether the case involves a viable claim for relief under the Just Compensation Clause. Petitioners contend that San Francisco's Residential Hotel Unit Conversion and Demolition Ordinance and its North Beach Neighborhood Commercial District zoning ordinance effect a taking because they fail to "substantially advance" a legitimate state interest. *See San Remo Hotel, LLP v. San Francisco City and County*, 364 F.3d 1088 (9th Cir. 2004). [2]

[2] Petitioners initially filed suit in federal court alleging that San Francisco's regulations effected a taking both because they did "not substantially advance legitimate state interests," and because they denied petitioners "economically viable use of [their] hotel." *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1101 (9th Cir. 1998). The Ninth Circuit ruled that the latter claim was unripe under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985), because petitioners had not pursued available state procedures for obtaining compensation. Subsequently, before the California courts, petitioners essentially abandoned their denial of economic use claims. *See San Remo Hotel L.P v. City and County of San Francisco*, 27 Cal.4th 643, 672 n. 14 (2002) (referring to the fact that petitioners abandoned their takings claims based on economic impact "as they climbed the appellate ladder"). Thus, by the time this litigation returned to the federal courts for the second time, the only claims petitioners were actively pursuing, and as to which they were seeking to avoid preclusion, were based on the substantially advances theory.

Thus, the specific question raised by this case is whether the California courts' rejection of petitioners' claims based on the substantially advances theory should preclude petitioners from relitigating claims based on the same theory under the federal Constitution in federal court. However, in the pending case of *Lingle v. Chevron*, U.S. No. 04-163, the Court has granted review to resolve whether a substantially advances claim represents a legitimate claim under the Just Compensation Clause at all, or whether instead such a claim raises a claim under the Due Process Clause. A decision in *Lingle* repudiating the substantially advances theory of takings liability would make a ruling in this case of questionable value, at best.

As a general proposition, it is inherently hazardous for the Court to entertain a question about the collateral consequences of a judgment based on a particular theory of liability when the validity of the theory of liability is itself in serious doubt. At best, the Court runs the risk of wasting judicial time and effort. At worst, the Court runs the risk of creating needless doctrinal confusion and unpredictability.

This potential difficulty might safely be ignored if the Court could be confident that the preclusive effect of a

takings judgment does not vary depending upon the specific nature of the takings theory being advanced. However, just the opposite might be true. The Court has indicated, without actually resolving whether a substantially advances claim represents a viable takings theory, that claims based on this theory would be governed by a *different* set of "ripeness" rules than the ripeness rules that govern traditional regulatory takings claims based on the burdensomeness of legitimate government actions. *See Yee v. Escondido*, 503 U.S. 519 (1992). Because a substantially advances claim "does not depend on . . . the extent to which [plaintiffs] are compensated," *id.* at 534, the Court said in *Yee*, the *Williamson County* state-court compensation requirement would not apply to this type of claim. Given this premise, different preclusion rules might apply to substantially advances claims than to claims based on adverse economic impact; indeed, petitioners' primary argument for why a taking claimant should be permitted to relitigate a taking claim in federal court is that the claimant is generally required under *Williamson County* to litigate the claim in state court first. Accordingly, the Court cannot be confident that its ruling on the preclusion issue in this case would not turn in part on the fact that petitioners are advancing a substantially advances claim (which may not represent a valid takings claim at all).

2. A second, closely related point is that the premise of the question presented—that petitioners were "required" to litigate their takings claims in state court—is not correct given the facts of this case. Petitioners, purely as a result of their voluntary choice, elected to litigate their takings claims in state court. Therefore, this case does not present the question that the petition for *certiorari* says it presents: what should be the preclusive effect of a judgment in a state court takings suit that a litigant was "required" to prosecute in order to "ripen" a federal takings claim? For this reason as well, the Court should consider dismissing this case and defer

resolution of this question until the Court is presented with a case that actually raises the question.

The voluntariness of petitioners' decision to litigate their takings claims in state court is directly relevant to the question of whether this is an appropriate case in which to attempt to decide the question presented. A central element of petitioners' argument is that it is "unfair" to compel a takings claimant to pursue a takings claim in state court and then, once the litigation has been concluded, to rely on the results of that litigation to bar the claimant from litigating the same claim under federal law in federal court. In fact, as the Conference discusses below, there is nothing unfair about this established rule; the only possible basis for thinking this rule is unfair is the mistaken notion that every litigant with a federal constitutional claim is entitled to have the claim heard by a federal court rather than a state court, a premise this Court has forcefully rejected. The immediately relevant point, however, is that these petitioners voluntarily chose to litigate their takings claims in state court and, therefore, this case does not involve the type of putative unfairness upon which petitioners are basing their legal arguments. Because this case does not present the circumstances that petitioners contend support creating an exception to operation of the Full Faith and Credit Act, this is an inappropriate case in which to weigh arguments for and against the creation of such an exception.

As discussed, petitioners contend that San Francisco's Residential Hotel Unit Conversion and Demolition Ordinance and its North Beach Neighborhood Commercial District zoning ordinance effect a taking because they fail to "substantially advance" a legitimate state interest. Petitioners presented these claims in the court below as both a "facial" taking claim and as an "as applied" taking claim. To explain why, contrary to the premise of the petition for *certiorari*, petitioners were *not* "required" to pursue their takings claims

in state court, it is helpful to address the facial and as applied claims separately.

Facial Claim. In its initial 1998 ruling, the U.S. Court of Appeals for the Ninth Circuit held that petitioners' facial substantially advances claim was "ripe" for consideration in federal court. *See San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1101 (9th Cir. 1998). The unmistakable meaning of that ruling was that petitioners were under no obligation to litigate this takings claim in state court in order to "ripen" the federal claim. Based on the understanding that the availability of compensation is irrelevant to a substantially advances taking claim, the court ruled that this type of claim was "ripe" for consideration in federal court regardless of whether compensation had been sought through state procedures. *Id.* at 1102, citing *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 409-10 (9th Cir. 1996). Because the Ninth Circuit plainly concluded that petitioners' facial substantially advances claim already was "a live" claim, *see id.* at 1102, petitioners are mistaken in asserting that they were "required" to resort to state court prior to prosecuting this federal claim in federal court.

The Ninth Circuit also decided, at petitioners' request,[3] to "abstain" from resolving petitioners' facial substantially advances claim pursuant to *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). *See* 145 F.3d at 1104-05. However, contrary to petitioners' suggestion, this abstention order did

[3] Petitioners first raised the possibility of abstention in the court of appeals, even though they had elected to sue in federal court and were pursuing an appeal from an adverse ruling by the federal district court. The Ninth Circuit observed, "Unsurprisingly, the City views [petitioners'] request for abstention as an outrageous act of chutzpah, and argues that [petitioners] should be stuck with the federal forum [they] chose." 145 F.3d at 1104-05. Nonetheless, the court concluded that the abstention issue could properly be addressed at any time during the litigation, and that abstention was in fact warranted in this case.

not compel petitioners to assert their takings claims in state court. The Ninth Circuit abstained in order to allow the California courts to resolve, as a matter of local law, whether petitioners' hotel property had improperly been classified as "residential" and whether petitioners were therefore exempt from the need to obtain regulatory approval to operate their hotel for tourist purposes. *See id.* at 1005. Nothing in the abstention order required petitioners to submit to the state court, along with their local law claim, a constitutional takings claim, either under state or federal law. Petitioners' decision to submit their takings claim in state court was completely voluntary.

The understanding that petitioners' decision to litigate their substantially advances claim in state court was voluntary is entirely consistent with *Pullman*. *Pullman* established that federal courts can properly defer resolution of a federal constitutional claim in order to give a state court the opportunity to address a potentially-dispositive issue of state law that might obviate the need to address the constitutional issue. In *Pullman* itself, the Court ruled that the federal court should defer resolving whether an order of the Texas Railroad Commission produced discrimination in violation of the Fourteenth Amendment in order to provide the Texas courts an opportunity to resolve whether the Commission had the statutory authority to issue the challenged order. *Pullman* did not suggest that plaintiffs, in the course of litigating the issue of Texas statutory law, had an obligation to submit their constitutional claim for resolution in the state court as well. To the contrary, the clear message of the decision is that the plaintiffs were entitled to reserve their constitutional claim for resolution in federal court.

The Court's subsequent decision in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), confirmed that an abstention order does not require a litigant to submit its constitutional claim for resolution by the state

courts. *England* addressed the procedures that apply when a claimant has properly involved federal court jurisdiction, the federal court has abstained under *Pullman* to allow a state court to address a potentially dispositive issue of state law, and the plaintiff wishes to preserve the option of litigating its federal constitutional claim in federal court. The Court ruled that a litigant who has properly invoked federal court jurisdiction in the first instance is entitled to insist upon his choice of a federal forum to hear his federal claim. At the same time, the Court recognized that a litigant could choose to waive the opportunity to litigate the constitutional issue in federal court by submitting the constitutional claim in state court, and that a litigant should be forever bound by the results of that choice. *See id.* at 419 ("we see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court"). The Court instructed that, when a litigant wishes to reserve the right to return to federal court, and avoid an inadvertent submission of the constitutional claim to the state court, the litigant should make a formal "reservation" indicating an intention to litigate the constitutional issue in federal court.

In this case, the effect of the abstention order was to require petitioners, prior to pursuing their "ripe" substantially advances claim in federal court, to seek resolution of the underlying local law question about the proper classification of their hotel property. If petitioners wished to reserve their federal constitutional claim for resolution in federal court, they were free to do so, and they could have asked the federal court to proceed to resolve their federal constitutional claim as soon as the local law issue had been resolved (assuming the resolution of that issue did not moot the entire case).[4] At

[4] The effect of the Ninth Circuit abstention order was that petitioners' facial substantially advance claim was held in abeyance pending resolution of the statutory issue. *See San Remo*, 145 F.3d at 1095 (remanding the case "with instructions to enter a stay under *Pullman*").

the same time, in accordance with *Pullman* and *England*, petitioners also had the option of submitting their constitutional claim in state court. In actuality, petitioners sought, in effect, to "have their cake and eat it too," by submitting in the state court their substantially advances claim under state law, but attempting to "reserve" the *substantively identical* substantially advances claim under federal law.

As a result, the actual issue presented by this case is quite different from the question framed by the petition for *certiorari*. This case involves the question of whether, following an abstention order, and after the claimant has *voluntarily* submitted the constitutional claim under state law in state court, the claimant is precluded from attempting to relitigate the substantively identical claim under federal law in federal court. Thus, even though petitioners already litigated the substantially advances claim under the California Constitution in state court, and even though the federal and state Constitutions provide equivalent protections in this context, and even though petitioners could have reserved the constitutional issue altogether and litigated the substantially advances claim as a matter of federal law in federal court in the first instance, petitioners nevertheless claim they are now entitled to relitigate the substantially advances claim for a second time in federal court.

The Federal District Court in California and the Ninth Circuit rejected this position, and properly so based on the Court's prior precedent. In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), for example, the Court ruled that a litigant's decision to present an employment discrimination claim under state law in state court precluded the plaintiff from subsequently attempting to relitigate the same issue under federal law in federal court. The Court observed

that, as in this case, nothing obligated the plaintiff to file its state law claim in state court, but having elected to do so, he was barred from raising the substantively identical claim under federal law in federal court. Denying preclusive effect to the state court judgment in this circumstance, the Court said, "would violate basic tenets of comity and federalism." *Id.* at 478.

The directly relevant point for present purposes, however, is that the case simply does not present the question framed by the petition for *certiorari*. Because petitioners faced no bar to prosecuting their facial substantially advances claim under federal law in federal court, and they voluntarily decided to submit their state-law substantially advances claim in state court, this case does not involve a situation where a takings claimant was "required" to submit a state law claim in federal court in order to "ripen" the federal claim. In this case, the federal claim was ripe in federal court before the petitioners even filed their state lawsuit. This case is not the case described in the petition for *certiorari*.

As Applied Claim. While the procedural history of the second part of petitioners' case is somewhat more complicated, petitioners were not "required," based on a proper understanding of applicable law, to submit an "as applied" substantially advances claim in state court either. Thus, it appears that the entirety of petitioners' case falls outside the scope of the question framed by the petition for *certiorari*.

The ambiguity surrounding the as applied substantially advances claim arises from the fact that the Ninth Circuit ruled in 1998 that petitioners' as applied claim was subject to *Williamson County's* state-compensation requirement, and in this sense "required" petitioners to pursue that "claim" in state court. *See* 145 F.3d at 1102. However, it is not clear what the Court understood that claim to encompass, and specifically whether it included a substantially advances theory, as opposed to petitioners' (initially asserted, but subsequently abandoned, see note 2, *supra*) takings claim based on the regulations' allegedly adverse economic impact. The Ninth Circuit opinion is simply opaque on what theory or theories of takings liability it believed were included in the as applied claim. The uncertainty is compounded by the fact that the Federal District Court, on October 15, 2002, following the decision of the California Supreme Court, ruled that petitioners' complaint, which closely tracked petitioners' initial federal complaint, failed to present a viable as applied substantially advances claim. While petitioners subsequently filed an amended complaint in order to state an as applied claim, this ruling suggests that the district court might well have regarded petitioners' initial complaint, filed prior to the litigation in the California courts, as not including an as applied substantially advances claim either. In sum, it is simply unclear whether the Ninth Circuit's ruling that the as applied claim was subject to *Williamson County* was intended to address a claim based on the substantially advances theory.

In any event, and regardless of what the Ninth Circuit actually intended in 1998,[5] there is no reason to believe that an as applied substantially advances claim is any more subject to *Williamson County's* state-compensation requirement than a facial substantially advances taking claim. *See Brief Amici Curiae of Equity Lifestyle Properties, Inc., et al., in support of petitioners* (advancing the same position). A

[5] In the 1998 *San Remo* decision the court cited an earlier Ninth Circuit decision which stated, in *dictum*, that both prongs of *Williamson County* "are clearly applicable" to "all" as applied cases, but that the applicability of the state-compensation requirement to a facial claim depends on whether the claim alleges a denial of all economically viable use or is based on the substantially advance theory. *See Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 405 (9th Cir. 1996). As discussed in text, this distinction is untenable, given the basic character of the substantially advances takings theory and its focus on actions that should not be permitted to proceed at all, rather than on actions that can properly proceed on the condition that the government pay just compensation.

substantially advances claim, whether facial or as applied, focuses on the legitimacy of the government action. Such a claim, by its nature, cannot be cured by payment of just compensation. Therefore such a claim cannot logically be subject to the *Williamson County* state-compensation requirement, regardless of whether it is framed as a facial claim or as an as applied claim.[6]

The idea that an as applied substantially advances claim might be subject to the state compensation requirement of *Williamson County* is inconsistent with this Court' s decision in *Yee v Escondido*, 503 U.S. 519, 534 (1992), in which the Court indicated that a substantially advances claim "does not depend on . . . the extent to which [plaintiffs] are compensated." The Court's conclusion that such a claim would be ripe without the need to exhaust state compensation procedures rests on the substantive nature of the takings theory, not on whether the theory is being asserted in a facial claim or as an as applied claim. Thus, the Ninth Circuit should have recognized that an as applied substantially advances claim, like a facial substantially advances claim, is not subject to the state compensation requirement of *Williamson County*. Applying this conclusion in this case, petitioners were not "required" to litigate either version of their substantially advances claim in state court.

Because the better view is that the Ninth Circuit could not properly have "required" petitioners to litigate *any* of their substantially advances claims in state court, this case would be a singularly poor vehicle for addressing what preclusion rules should apply to takings claims when litigants *are* required to litigate the claims in state court. While, as we

[6] By contrast, *Williamson County* does logically apply to claims under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which involve alleged expropriations of private property in the form of unconstitutional conditions attached to land use permitting decisions.

discuss below, involuntary participation in state court proceedings hardly creates a blanket exception to the Full Faith and Credit Act, the petitioners' arguments in this case rest in large part on the alleged unfairness of giving preclusive effect to judgments in state court proceedings in which they were involuntary participants. Since the factual premise of "involuntariness" underlying these arguments is not met in this case, this is an inappropriate case to test the merits of petitioners' arguments.

* * *

It is also noteworthy that the conclusion that petitioners' substantially advances claims were immediately "ripe" for consideration in federal court also makes irrelevant, at least in the context of this particular case, petitioners' argument that takings claimants must be granted the opportunity to relitigate their takings claims in federal court in order to ensure that *some* forum is available to hear their federal constitutional claims. As the Conference discusses below, it is far from clear that a takings claimant can assert an absolute right to litigate a takings claim under federal law when he has the opportunity to litigate the substantively identical claim under state law. In any event, this case simply does not provide an appropriate occasion to address petitioners' argument. For the same reason that the Ninth Circuit correctly ruled that petitioners' substantially advances claim was immediately ripe in federal court, petitioners' substantially advances claim also was immediately ripe in state court. Under the reasoning of the Ninth Circuit, if petitioners had wished to do so, they were entitled to prosecute this federal takings claim alongside their state takings claim in the state court. Thus, contrary to petitioners' suggestion, this case does not present the question of whether takings litigants should be permitted to relitigate takings claims in federal court in order to preserve the opportunity to present a federal taking claim in some court. For this additional reason, this is not an appropriate case in which to address the issue framed by the petition for

certiorari. The Court should consider dismissing this case on the ground that the writ of *certiorari* was improvidently granted.

II. ALLOWING DUPLICATIVE LITIGATION OF TAKINGS CLAIMS IN STATE AND FEDERAL COURT WOULD PRODUCE A SERIOUS WASTE OF JUDICIAL RESOURCES, UNDERMINE JUDICIAL COMITY, AND BE INCONSISTENT WITH THE POLICY FAVORING REPOSE.

Petitioners propose that they and other takings claimants should routinely be permitted to litigate substantively identical takings claims twice, first in state court (under state law), and then a second time in federal court (under federal law). Apart from the fact that there is no legal warrant for this position, as we discuss in the following section, this proposal raises serious risks of harm to the federal and state judiciaries and to the relationship between these coordinate judicial institutions within our federal system of government.

Permitting duplicative litigation of a single substantive takings claim would produce a very substantial waste of judicial resources for no good purpose. Both the federal courts and state courts continue to confront rapidly increasing case loads. *See Chief Justice's 2004 Year-End Report on the Federal Judiciary*, January 1, 2005, at 9-11; National Center for State Courts, *Examining the Work of the State Courts, 2003*, at 10. At the same time, both court systems face increasing budget constraints; indeed, in his latest year-end report, Chief Justice Rehnquist highlighted the "funding crisis currently affecting the Federal Judiciary." In view of the important work of the federal and state courts, and the challenges both systems already face in meeting their responsibilities to the public, requiring federal and state

courts to adjudicate a single takings lawsuit *twice* would represent a serious misallocation of scare resources.

Furthermore, allowing takings litigants to litigate takings claims successively in state and federal court would undermine the principle of comity that governs the relationship between the federal and state court systems. As the Court has explained, the "federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design." *Kowalski v. Tesmer*, 125 S.Ct. 564, 569 (2004), *quoting Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999). This cooperative design would obviously be undermined if state court judgments on taking claims could routinely be subjected to correction and revision in federal court.

For the same reason, allowing this type of duplicative litigation would be inconsistent with the *Rooker-Feldman* doctrine. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Under the *Rooker-Feldman* doctrine, a party who has lost a suit in state court is generally barred from seeking what in substance would be appellate review of the state judgment in federal court. Yet, where a takings claimant seeks to relitigate in federal court a taking claim that is substantively identical to a claim that he has already litigated in state court, such a suit, in effect, asks the federal court to exercise appellate jurisdiction over the state courts.

Finally, petitioners' position is inconsistent with the Court's longstanding recognition of the high value of bringing repose to legal disputes. As the Court explained in *Federated Department Stores, Inc. v. Moietie*, 452 U.S. 394, 401 (1981):

> This Court has long recognized that '[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of

> the contest, and that matters once tried shall be considered forever settled as between the parties.' We have stressed that '[t]he doctrine . . . is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and private peace,' which should be cordially regarded and enforced by the courts.

Id. at 401. Allowing takings claimants, once they have unsuccessfully prosecuted a takings claim under state law in state court, to pursue a substantively identical claim under federal law in federal court would plainly violate the policy favoring repose. As the Court has recognized, in the context of overlap of jurisdiction between state and federal courts, the policy of repose not only serves the traditional functions of claim and issue preclusion, *see Kremer*, 456 U.S. at 467, n.6, *quoting Allen v McCurry*, 449 U.S. 90, 94 (1980) (preclusion doctrine "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication"), but also serves to "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Id.*

III. PETITIONERS ARE BARRED BY THE FULL FAITH AND CREDIT ACT FROM SEEKING TO RELITIGATE TAKINGS CLAIMS IN FEDERAL COURT.

Assuming for the sake of argument that petitioners had been required under *Williamson County* to litigate a proper takings claim for compensation in state court in the first instance, they should nevertheless still be barred from relitigating the same claim in federal court. [1]

1. The Full Faith and Credit Act, 28 U.S.C. §1738, provides that the records and proceedings in any state court

"shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State. . . . from which they are taken." The statute has been interpreted to require federal courts to give "a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School District Bd. of Educ.*, 465 U.S. 75, 81 (1984). Thus, if a state court would treat litigation of an issue as precluded by a prior ruling, the federal courts must apply the same rule. In this case, the Ninth Circuit ruled that because the California courts would conclude that petitioners are barred from relitigating their takings claims, petitioners were barred from seeking to relitigate the claims in federal court.

As the Court explained in *Migra*, the Full Faith and Credit Act reflects Congress' considered policy judgment "that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims." *Id.* at 84. Thus, the Court has recognized that the command of the Full Faith and Credit Act applies regardless of whether a litigant has chosen the state forum voluntarily. What matters is that the litigant has a full and fair opportunity to litigate the issue in some court, including the opportunity to obtain correction on issues of federal law in this Court. In *Allen v. McCurry*, 449 U.S. 90 (1980), the Court ruled that a section 1983 claimant in federal court was barred from asserting a claim based on an allegedly unconstitutional search and seizure when the constitutionality of the search and seizure had already been resolved in a state criminal proceeding that led to plaintiff's conviction. The Court concluded that the fact that plaintiff's participation in the state proceeding was involuntary was irrelevant. "There is," the Court said, "no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state

court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all." *Id.* at 104.

The Court also has recognized that Congress can, in its discretion, enact legislation amending the Full Faith and Credit Act to permit successive litigations in state and federal courts that the statute would otherwise prohibit. *See Allen v. McCurry*, 449 U.S. at 99. However, the Court has said that "an exception to §1738 will not be recognized unless a later statute contains an express or implied partial repeal." *Kremer*, 456 U.S. at 468. Petitioners point to no federal legislation that repeals the Full Faith and Credit Act and permits federal courts to ignore principles of claim and issue preclusion in the context of takings litigation. To the contrary, during the last decade, several bills have been introduced in Congress that would have modified the state-compensation requirement of *Williamson County* as well as other aspects of the Court's ripeness rules for takings cases. *See generally* S.Rep. 105-242 (Private Property Rights Implementation Act of 1998). However, these bills repeatedly failed to gain passage. Especially in light of the fact that Congress has declined to alter the current allocation of federal and state court jurisdiction in takings cases, the Court should reject petitioners' invitation to create an exception to the Full Faith and Credit Act in this case.

2. Contrary to petitioners' assumption that they have an entitlement to a federal forum, there is no absolute right to litigate federal constitutional issues in a federal court. It is well established that the Constitution "left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). Even after the establishment of the federal courts, Congress

has not vested the federal courts with the full scope of the jurisdiction that they could be granted under the Constitution. *See* Kathryn E. Kovacs, "Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under Williamson County," 21 *Ecology Law Quarterly* 1, 36 (1999). Thus, there is no historical foundation for the idea that every takings claimant is entitled to present a federal claim in federal court.

Moreover, the Court has repeatedly recognized that the state courts have both the responsibility and authority to protect federal constitutional rights when called upon to do so. "State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law." *Stone v. Powell*, 428 U.S. 465, 494 n. 35 (1976), *citing Martin v. Hunter's Lessee*, 1 Wheat. 304, 341-344 (1816). As the Court explained in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), respect for the state courts' coordinate responsibility in enforcing federal constitutional rights reinforces basic principles of federalism:

> Interpretation of federal law is the proprietary concern of state, as well as federal, courts. It is the right and duty of the States, within their own judiciaries, to interpret and to follow the Constitution and all laws enacted pursuant to it, subject to a litigant's right of review in this Court in a proper case. The Constitution and laws of the United States are not a body of law external to the States, acknowledged and enforced simply as a matter of comity. The Constitution is the basic law of the Nation, a law to which a State's ties are no less intimate than those of the National Government itself. The separate States and the Government of the United States are bound in the common cause of preserving the whole constitutional order. Federal and state law 'together form one system of jurisprudence.'

Id. at 275-76, *quoting Claflin v. Houseman*, 93 U.S. 130, 137 (1876).

3. Petitioners and their *amici* erroneously contend that one consequence of a rule barring takings claimants from relitigating their takings claims in federal court is that they may be unfairly barred from litigating their federal takings claims in *any* court. This argument is based on the understanding that the ripeness doctrine of *Williamson County*, combined with claim and issue preclusion doctrines, might mean that traditional takings claims based on adverse economic impact would not only be barred in the first instance in federal court, but they would also be barred in state court as well. According to this view, federal takings claims must be deemed "premature," in state court, just as they would be in federal court, if relief is potentially available under state law. Assuming a claim is initially filed under state law in state court, once the state law claim is rejected, the federal claim would be immediately precluded. In this fashion, according to this argument, not only is a takings claimant barred from pursuing a federal takings claim in federal court when state compensation procedures are available, but the claimant is barred from pursuing the federal claim in state court as well.

In the first place, if federal and state law are substantively identical, then the litigant suffers no actual deprivation as a result of having to litigate the claim as a matter of state law. Furthermore, insofar as federal and state law are regarded as substantively identical, and the state law claim is interpreted and applied in light of federal law precedents, full review should be available in this Court. *See Pennsylvania v. Muniz*, 496 U.S. 582, 588 n.4 (1990). Finally, to the extent there is not a complete and perfect overlap between state and federal law, a prior state court resolution of a state law claim should *not* preclude litigation of the distinctive federal law issue in federal court, as the lower federal courts have recognized on numerous occasions. *See, e g., Dodd v. Hood River County*, 136 F.2d 1219 (9th Cir. 1998).

More fundamentally, however, petitioners' argument that *Williamson County* bars prosecution of a federal takings claim alongside a state law claim in state court appears to be incorrect. Certainly this position is inconsistent with numerous decisions of this Court involving review of state courts' interpretation of the federal Just Compensation Clause. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). These cases necessarily rest on the premise that the state courts have full authority and competence to hear takings claims under the U.S. Constitution. The Fifth Amendment applies directly to the states via the Fourteenth Amendment, and state compliance with the Federal Constitution includes, of course, a responsibility on the part of state judicial institutions to address legal claims brought under the federal Constitution.

Furthermore, petitioners' argument would apparently make nonsense of the Court's landmark decision in *First English Evangelical Lutheran Church v. City of Los Angeles*, 482 U.S. 304 (1987). In that case, the Court ruled that the California Supreme Court erred in not recognizing that the Just Compensation Clause provides a direct right to financial relief against government defendants. The decision would have been a pointless exercise if state courts generally, and the California courts in particular, were powerless to address federal takings claims on the merits. It is obvious that the Court believed the California Supreme Court and other state courts would, in fact, have a direct obligation to implement *First English*'s interpretation of the mandate imposed by the Just Compensation Clause. When the Court said, "A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation," it clearly contemplated that such a suit could be brought in state court. 482 U.S. at 315. *See also id.* ("Claims for just compensation are grounded in the Constitution itself.").

The argument that *Williamson County* precludes state courts from directly addressing takings claims under the Fifth Amendment, whether filed alone or in tandem with takings claims under state law, is based on an unnecessarily broad reading of that decision. *Williamson County* involved a federal takings claim filed in federal court. The Court ruled that a claim for compensation in federal court under the Just Compensation Clause is "premature" when state procedures for obtaining compensation are available. The Court's explanation for this ruling was that the Just Compensation Clause only prohibits uncompensated takings, and a federal court cannot determine whether a State or one of its subdivisions has both effected a taking, and refused to provide the necessary compensation, unless and until the State has had an opportunity to pass on a claim for compensation. This reasoning does not support the conclusion that a federal claim is necessarily premature when a state court, rather than a federal court, receives a claim for compensation based on an alleged taking. A state court, in addressing a claim for compensation under the Just Compensation Clause (or the state equivalent), is being asked to determine, on behalf of the State, whether the State will provide the compensation mandated by the Constitution. The Court in *Williamson County* referred to the need for takings claimants to pursue "state procedures," but the case does not hold that the substantive basis for the claim for compensation in the state forum must be limited to state law and that the state lawsuit cannot include a claim under the federal Constitution.

4. Petitioners also contend that, because they made a so-called "*England* reservation" in the California trial court, reserving the "right" to prosecute their federal takings claims in federal court, they should be permitted to relitigate their substantially advances claims in federal court. *See England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411

(1964). This argument is mistaken and should be rejected as well.

First, an *England* reservation cannot properly be deployed to authorize successive litigation of claims for compensation in state court, under state law, and then later in federal court, under the Just Compensation Clause. In general, claim preclusion applies to claims that were asserted, or that could have been asserted, in the first proceeding. For the reasons discussed, a claim under the Just Compensation Clause can be joined with a taking claim under state law in state court and, therefore, a state court judgment in a takings case ordinarily should bar the plaintiff from asserting a federal taking claim in any subsequent federal court case, whether or not the plaintiff actually raised the federal takings claim in state court.

An *England* reservation should not operate as an end-run around claim preclusion in this context. Under *Williamson County*, a claimant cannot bring a traditional takings suit based on adverse economic impact in federal court in the first instance when there is an available state process for obtaining compensation. However, *England* only applies in the situation where a plaintiff can "properly invoke" federal court jurisdiction to hear a federal constitutional claim in the first instance. *Id.* at 415. *See also id.* ("The right of a party plaintiff to choose a Federal court *where there is a choice* cannot be properly denied."), *quoting Wilcox v. Consolidated Gas Co.*, 212 U.S. 19 (1909) (emphasis added). It would "expand[] the *England*-reservation doctrine beyond its intended scope" to permit a plaintiff to "reserve" the opportunity to litigate a federal takings claim in federal court that, by its nature, could not be filed directly in federal court in the first place. *DLX, Inc. v. Kentucky*, 381 F.3d 511, 531-32 (6th Cir. 2004) (Baldock, J., concurring in the judgment). *See also Allen v. McCurry*, 449 U.S. 90, 101 n. 17 (1980) ("The holding in *England* depended entirely on this Court's view of the purpose of abstention in such a case: Where a

plaintiff properly invokes federal-court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction.").

Furthermore, it would distort the function of an *England* reservation to treat it as a device authorizing a claimant to assert substantively identical legal claims in state court and then again in federal court. In *England* the federal court abstained to permit state-court resolution of a state statutory issue that was substantively unrelated to the federal constitutional claim. *See also Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) (same). It would place an entirely new twist on *England* to interpret it, not as authorizing "reservation" of a distinctive federal claim for resolution in federal court, but as authorizing duplicative litigation of what is, in substance, the exact same claim in state as well as federal court. Indeed, a central premise of *England* is that a litigant can properly be compelled to litigate a constitutional claim in *either* state *or* federal Court; the Court specifically observed that duplicative litigation of the same issue in federal and state court would disrupt "the harmonious relation between state and federal authority." 375 U.S. at 421 n. 12. By contrast, the ersatz version of the *England* reservation proposed by petitioners would turn it into a device for obtaining multiple forums to hear the same constitutional claim. Neither the holding nor the reasoning of *England* suggests that a plaintiff should have the opportunity to litigate what is in substance the exact same claim twice.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Ninth Circuit.[7]

Respectfully submitted,

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March 1, 2005

[7] Several of petitioners' *amici* have suggested that the Court overrule *Williamson County* and its holding that takings claimants suing for compensation under the Just Compensation clause based on state and local government action must pursue available state compensation procedures instead of suing in federal court. Even if the Court does not dismiss the writ as improvidently granted, it should decline to address this issue, because it is plainly outside the scope of the question presented.